

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOLOMON KELLY, JAMES)
MOLINA, AS INDIVIDUALS)
AND ON BEHALF OF ALL)
OTHER SIMILARLY)
SITUATED,)
Plaintiffs,)
v.)
BEAZER HOMES USA, INC.;)
BEAZER HOMES HOLDINGS)
CORP.; BEAZER MORTGAGE)
CORPORATION; AND DOES 1)
THROUGH 10, INCLUSIVE,)
Defendants.)

Case No. EDCV 09-01674
VAP (DTBx)

**[Motion filed on January 22,
2010]**

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS FOR LACK
OF STANDING, WITH PREJUDICE,
AND DENYING DEFENDANTS'
MOTION TO STRIKE AS MOOT**

Defendants' Motions to Dismiss and to Strike came before the Court for hearing on March 15, 2010. After reviewing and considering all papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion to Dismiss and DENIES the Motion to Strike as moot.

1 I. BACKGROUND

2 A. Plaintiffs' Allegations

3 Plaintiff Solomon Kelly ("Kelly") alleges he
4 purchased a new residence in September 2005 in San
5 Bernardino County, California from Beazer Homes, made a
6 down payment of about 50%, financed the balance through
7 Beazer Mortgage Corporation ("Beazer Mortgage"), and
8 still owns and occupies the residence. (First Amended
9 Complaint ("FAC") ¶ 39.)

10
11 Plaintiff James Molina ("Molina") alleges he
12 purchased a new residence in January 2006 in Riverside
13 County, California from Beazer Homes, made a down payment
14 of 20%, and still owns and occupies the residence. (FAC
15 ¶ 40.)

16
17 Plaintiffs Kelly and Molina (collectively,
18 "Plaintiffs") bring this putative class action on behalf
19 of themselves and a national class including "[a]ll
20 Beazer Homes customers who purchased a new Beazer Homes
21 house from January 1, 2004, through December 31, 2006,
22 and put 20% or more down toward the purchase of the
23 house[,]" or alternatively, "a class of new Beazer Homes
24 customers whose homes are located in California." (FAC
25 ¶¶ 53-54.)

1 Plaintiffs allege "on information and belief" that
2 before 2004, Defendants Beazer Homes USA, Inc., Beazer
3 Homes Holdings Corp., and Beazer Mortgage (collectively,
4 "Defendants" or "Beazer Defendants") implemented a
5 "scheme" to increase the number of houses sold and to
6 increase the amount of profit per sale. (FAC ¶ 19.) The
7 "scheme" was intended to "convince government entities,
8 then the community, and finally buyers that Defendants
9 were building a traditional neighborhood with stable
10 owners who occupied their homes and who were vested in
11 the community and the neighborhood." (FAC ¶ 20.)
12 "Implicit in this marketing scheme was that Defendants
13 were making a good-faith effort to sell homes to buyers
14 who [Defendants] expected could afford to buy the houses
15 and would be stable neighbors." (Id.)

16
17 Plaintiffs allege that they were provided "marketing
18 materials that depicted the community as a stable,
19 family[-]based neighborhood." (FAC ¶¶ 39, 40.)
20 Plaintiffs also allege "on information and belief" that
21 Defendants represented that they did not sell houses in
22 Plaintiffs' neighborhoods to investors who would not
23 occupy the houses. (FAC ¶¶ 26, 29, 39, 40.)

24
25 Plaintiffs allege Defendants engaged in a scheme to
26 market the houses to, and provide financing for,
27 "unqualified buyers who posed an abnormally high risk of
28

1 foreclosure . . . to increase both the number of sales
2 and the prices of the houses in same neighborhoods in
3 which Defendants were selling to traditionally qualified
4 and low-foreclosure- risk buyers." (FAC ¶ 21.)
5 Plaintiffs generally allege that Defendants assisted and
6 encouraged the "unqualified" buyers to appear qualified.
7 (FAC ¶ 24.)

8
9 Plaintiffs assert that Defendants "concealed and
10 intentionally failed to disclose to prospective buyers .
11 . . that numerous houses in the neighborhoods were being
12 purchased by unqualified and high-foreclosure-risk
13 buyers, despite Defendants' knowledge that this could,
14 and likely would over time, have a material negative
15 effect on the value and desirability of the house and the
16 neighborhood." (FAC ¶ 30.)

17
18 Plaintiffs allege two theories of harm stemming from
19 Defendants' conduct. First, Plaintiffs allege they "paid
20 inflated prices for their houses" as a result of
21 Defendants' failure to disclose that "Defendants had sold
22 houses . . . to unqualified and high-foreclosure-risk
23 buyers. . . [and] to investors who would not occupy the
24 houses." (FAC ¶¶ 31, 33, 35, 48, 52.) Secondly,
25 Plaintiffs allege they suffered an injury years after
26 purchasing their houses when the real estate market
27 declined and the "unqualified" buyers defaulted on their
28

1 loans and lost their houses in foreclosure proceedings,
2 which led to a decline in the value of Plaintiffs'
3 residences. (FAC ¶¶ 27, 32, 33.)
4

5 **B. Procedural History**

6 On September 3, 2009, Plaintiff Kelly filed a
7 putative class action against Defendants. On the same
8 day, Plaintiff's counsel filed seven other similar class
9 actions¹ ("Homebuilder Actions") alleging that the
10 homebuilder defendants and their mortgage lending
11 affiliates engaged in conduct that "artificially
12 inflated" the purchases prices of plaintiffs' residences
13 and eventually reduced their value.
14

15 On October 23, 2009, Defendants joined in a "Motion
16 to Consolidate," which sought to consolidate the eight
17 Homebuilder Actions. The Court denied the Motion to
18

19 ¹ The Homebuilder Actions are:

- 20 • Dodaro v. Standard Pacific Corp., et al., ED09-
CV1666-VAP (OPx)
21 • Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-
VAP (DTBx)
22 • Lumalu et al. v. Richmond American Homes Corp., et
al., ED09-CV1669-VAP (OPx)
23 • Oneto v. The Ryland Group, Inc., et al., ED09-CV1670-
VAP (DBTx)
24 • Maya, et al. v. Centex Corp., et al., ED09-CV1671-VAP
(OPx)
25 • Martinez, et al. v. D.R. Horton, et al., ED09-CV1672-
VAP (DBTx)
26 • Nielson, et al. v. Shea Homes, Inc, et al., ED09-
CV1673-VAP (DTBx)
27 • Kelly, et al. v. Beazer Homes USA, Inc., et al.,
ED09-CV1674-VAP (DTBx)
28

1 Consolidate. On November 18, 2009, the Homebuilder
2 Actions were transferred to this Court. On December 21,
3 2009, Plaintiff Kelly and a newly added plaintiff,
4 Plaintiff Molina, filed the FAC, which added allegations
5 regarding the Defendants. The substance of the claims
6 remains unchanged.

7
8 Plaintiffs allege five claims: (1) fraud; (2)
9 negligent misrepresentation; (3) violation of
10 California's Unfair Business Practices Act, Cal. Bus. &
11 Prof. Code §§ 17200, et seq.; (4) violation of Cal. Bus.
12 & Prof. Code §§ 17500, et seq.; and (5) breach of the
13 implied covenant of good faith and fair dealing.

14
15 On January 22, 2010, Defendants filed: (1) a Motion
16 to Dismiss ("Motion"), (2) a Motion to Strike Portions of
17 the First Amended Complaint, and (3) a Request for
18 Judicial Notice. On February 22, 2010, Plaintiffs filed
19
20
21
22
23
24
25
26
27
28

1 Opposition² to both Motions. On March 4, 2010,
2 Defendants filed a Reply for both Motions.

3
4 Defendants argue the FAC should be dismissed for the
5 following reasons: (1) Plaintiffs lack constitutional
6 standing to bring this action; (2) Plaintiffs fail to
7 allege their fraud-based claims with particularity as
8 required by Rule 9(b); (3) Plaintiffs fail to state a
9 claim as to each cause of action under 12(b)(6). (Mot.
10 at 1.)

11
12 **II. LEGAL STANDARD FOR MOTION TO DISMISS UNDER**
13 **RULE 12(b)(6)**

14 Rule 12(b)(6) allows a party to bring a motion to
15 dismiss for failure to state a claim upon which relief
16 can be granted. As a general matter, the Federal Rules
17 require only that a plaintiff provide "'a short and plain
18 statement of the claim' that will give the defendant fair
19 notice of what the plaintiff's claim is and the grounds
20

21 ² Counsel for the plaintiffs in the eight Homebuilder
22 Actions divides the subject matter of the oppositions to
Homebuilder Defendants' Motions as follows:

- 23 • Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-
VAP (DTBx): Plaintiffs' Opposition addresses
constitutional standing ("Stephens Opp'n").
- 24 • Oneto v. The Ryland Group, Inc., et al., ED09-CV1670-
VAP (DBTx): Plaintiffs' Opposition addresses
25 Plaintiffs' UCL claims and claims for breach of the
implied covenant of good faith and fair dealing
26 ("Oneto Opp'n").
- 27 • Nielson, et al. v. Shea Homes, Inc, et al., ED09-
CV1673-VAP (DTBx): Plaintiffs' Opposition addresses
28 Rule 9 ("Nielson Opp'n").

1 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47
2 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic
3 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In addition,
4 the Court must accept all material allegations in the
5 complaint -- as well as any reasonable inferences to be
6 drawn from them -- as true. See Doe v. United States,
7 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S.
8 Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

9
10 "While a complaint attacked by a Rule 12(b)(6)
11 motion to dismiss does not need detailed factual
12 allegations, a plaintiff's obligation to provide the
13 'grounds' of his 'entitlement to relief' requires more
14 than labels and conclusions, and a formulaic recitation
15 of the elements of a cause of action will not do." Bell
16 Atlantic, 550 U.S. at 555 (citations omitted). Rather,
17 the allegations in the complaint "must be enough to raise
18 a right to relief above the speculative level." Id.

19
20 In other words, the allegations must be plausible on
21 the face of the complaint. See Ashcroft v. Iqbal, 556
22 U.S. ___, 129 S. Ct. 1937, 1949 (2009). "The
23 plausibility standard is not akin to a 'probability
24 requirement,' but it asks for more than a sheer
25 possibility that a defendant has acted unlawfully. Where
26 a complaint pleads facts that are 'merely consistent
27 with' a defendant's liability, it stops short of the line
28

1 between possibility and plausibility of 'entitlement to
2 relief.'" Id. (citations and internal quotations
3 omitted).

4
5 Although the scope of review is limited to the
6 contents of the complaint, the Court may also consider
7 exhibits submitted with the complaint, Hal Roach Studios,
8 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19
9 (9th Cir. 1990), and "take judicial notice of matters of
10 public record outside the pleadings," Mir v. Little Co.
11 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

12
13 "Failure to properly allege standing is a ground for
14 dismissal under Rule 12(b)(6)." MAI Sys. Corp. v. UIPS,
15 856 F. Supp. 538, 539 (N.D. Cal. 1994), citing W. Mining
16 Council v. Watt, 643 F.2d 618 (9th Cir. 1980).

17 18 **III. DISCUSSION**

19 Article III of the Constitution gives federal courts
20 jurisdiction over "cases and controversies." U.S. Const.
21 Art. III, § 2, cl. 2. "In essence the question of
22 standing is whether the litigant is entitled to have the
23 court decide the merits of the dispute or of particular
24 issues." Warth v. Seldin, 422 U.S. 490, 498 (1975).
25 Standing, therefore, is a threshold issue in every
26 federal case. Elk Grove Unified Sch. Dist. v. Newdow,
27 524 U.S. 1, 11 (2004) ("In every federal case, the party
28

1 bringing the suit must establish standing to prosecute
2 the action."); Warth, 422 U.S. at 517-18; McMichael v.
3 County of Napa, 709 F.2d 1268, 1269 (9th Cir. 1983)
4 ("Before the judicial process may be invoked, a plaintiff
5 must 'show that the facts alleged present the court with
6 a 'case or controversy' in the constitutional sense and
7 that [he] is a proper plaintiff to raise the issues
8 sought to be litigated.'"), citing Linda R.S. v. Richard
9 D., 410 U.S. 614, 616 (1973).

10
11 To satisfy the "case or controversy" requirement, a
12 plaintiff "must demonstrate that he has suffered an
13 'injury in fact'" that a favorable judgment will redress.
14 Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Newdow,
15 542 U.S. at 12, citing Lujan v. Defenders of Wildlife,
16 504 U.S. 555, 560-561 (1992). In other words, a
17 plaintiff must demonstrate: (1) he has suffered an
18 "'injury in fact' -- an invasion of a legally protected
19 interest which is (a) concrete and particularized, and
20 (b) actual or imminent, not conjectural or hypothetical";
21 (2) there is a causal connection between the injury and
22 the conduct complained of -- that is, the injury is
23 "fairly traceable" to the challenged action of the
24 defendant, and not the result of the independent action
25 of some third party not before the court; and (3) it is
26 "likely," as opposed to merely "speculative," that the
27 injury will be redressed by a favorable judicial
28

1 decision. Lujan, 504 U.S. at 560-61 (footnote,
2 citations, and quotation marks omitted).

3
4 The party invoking federal jurisdiction bears the
5 burden of establishing the elements of standing. Lujan,
6 504 U.S. at 561, citing FW/PBS, Inc. v. Dallas, 493 U.S.
7 215, 231 (1990); Warth, 422 U.S. at 508. As the three
8 elements of standing "are not mere pleading requirements
9 but rather an indispensable part of the plaintiff's case,
10 each element must be supported in the same way as any
11 other matter on which the plaintiff bears the burden of
12 proof, *i.e.*, with the manner and degree of evidence
13 required at the successive stages in litigation." Lujan,
14 504 U.S. at 561; Lujan v. Nat'l Wildlife Fed'n, 497 U.S.
15 871, 883-89 (1990); Gladstone Realtors v. Village of
16 Bellwood, 441 U.S. 91, 114-15 & n.31 (1979); Simon v. E.
17 Kentucky Welfare Rights Org., 426 U.S. 26, 45 & n.25
18 (1917); Warth, 422 U.S. at 527 & n.6). "At the pleading
19 stage, general factual allegations of injury resulting
20 from the defendant's conduct may suffice" Id.,
21 citing Nat'l Wildlife Fed'n, 497 U.S. at 889.

22
23 Plaintiffs must satisfy Article III standing
24 requirements to assert each of their claims in federal
25 court. As Plaintiffs' claims all are founded upon the
26 same alleged injuries, the Court's analysis applies to
27 each of them. Plaintiffs fail to establish standing
28

1 because they have not pled an injury in fact and have not
2 shown how their alleged injuries are "fairly traceable"
3 to Defendants' alleged actions.

4
5 **A. Injury in Fact**

6 Defendants first focus on whether Plaintiffs have
7 suffered a "concrete and particularized, and actual or
8 imminent" injury necessary to meet the first element of
9 Article III standing. Lujan, 504 U.S. at 560-61. To
10 satisfy the "injury in fact" requirement, "[t]he
11 plaintiff must show that he has sustained or is
12 immediately in danger of sustaining some direct injury as
13 a result of the [defendant's] conduct and the injury or
14 threat of injury must be both real and immediate, not
15 conjectural or hypothetical." City of Los Angeles v.
16 Lyons, 461 U.S. 95, 101-02 (1983) (citations omitted);
17 Lujan, 504 U.S. at 560 ("[By injury in fact we mean] an
18 invasion of a legally protected interest which is (a)
19 concrete and particularized, . . . and (b) actual or
20 imminent, not 'conjectural' or 'hypothetical'.").

21
22 As noted above, Plaintiffs allege they were injured
23 by (1) paying "inflated" purchase prices for their houses
24 as a result of the "buying frenzy" created because
25 Defendants sold houses to "unqualified" buyers
26 ("overpayment theory") (FAC ¶¶ 31, 33, 35, 48, 52), and
27 (2) suffering a reduction in the value of their
28

1 properties caused by Defendants' wrongful acts and
2 omissions ("reduced-value theory") (FAC ¶¶ 27, 32, 33).
3 These alleged harms fall short of a concrete, particular,
4 and actual injury.

5
6 **1. Reduced-Value Theory**

7 The Court first considers Plaintiffs' reduced-value
8 theory. Plaintiffs still own their houses, so their
9 assertions of loss are conjectural. Any loss (or gain)
10 -- presumably measured against the initial purchase price
11 -- cannot be ascertained, nor measured, unless and until
12 the owner sells the house. See Phillips v. Frank, 295
13 F.2d 629, 632 (9th Cir. 1961) (recognizing that a gain or
14 loss in real property cases is determined at the time of
15 sale).

16
17 Moreover, the cause of any such loss cannot be
18 determined until that time as well. In other words,
19 Plaintiffs have alleged only harm which, rather than
20 being specific and concrete, is general and tied so
21 closely to pervasive economic conditions and harms, that
22 it does not suffice as an allegation of direct injury.
23 See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d
24 763, 770 (2d Cir. 1994) (recognizing that a number of
25 variables can affect real estate values).

1 Other courts have reached the same conclusion when
2 faced with nearly identical allegations. See Kaing v.
3 Pulte Homes, Inc., No. 09-5057, 2010 WL 625365, at *5-6
4 (N.D. Cal. Feb. 18, 2010); Tingley v. Beazer Homes Corp.,
5 No. 07-176, 2008 WL 1902108, at *5, n.3 (W.D.N.C. April
6 25, 2008) ("harm is only realized if Plaintiffs sell
7 their home."); Green v. Beazer Homes Corp., No. 07-1098,
8 2007 WL 2688612, at *3 (D.S.C. Sept. 10, 2007)
9 (dismissing the action because "Plaintiff does not . . .
10 suggest that she or any of her other similarly 'injured'
11 neighbors have realized this decrease in value (e.g., as
12 a result of sale of the home).").

13
14 In Kaing, the district court found that a plaintiff
15 in a putative class action against defendant homebuilders
16 lacked standing to assert a theory "that she ha[d] been
17 injured because [the homebuilders'] lending practices
18 caused widespread foreclosures in her neighborhood,
19 [which had] driven down the value of her house." 2010 WL
20 625365, at *5. There, the plaintiff alleged that the
21 defendants "marketed the neighborhoods as stable and
22 desirable neighborhoods, while becoming even more
23 aggressive in selling homes to unqualified and high-
24 foreclosure-risk buyers" Id. at *2. The
25 plaintiff alleged that high foreclosure rates in her
26 neighborhood decreased the value of her house by over
27 50%. Id.

28

1 Furthermore, the Kaing defendant homebuilders'
2 misconduct also allegedly "result[ed] in abandoned
3 houses; multiple families living in one home; transient
4 neighbors with no long-term ties to the neighborhood;
5 unfinished yards and unkempt yards; and, in some cases,
6 increased crime." Id. at *5. There, as here, the
7 plaintiff still owned her residence when she brought the
8 action. Id. at *1-2. Also like the Plaintiffs here, the
9 Kaing plaintiff alleged she was harmed by the homebuilder
10 defendants' failure to provide her with a disclosure that
11 "Defendants had sold houses, and would sell houses in the
12 future, to unqualified and high-foreclosure-risk buyers."
13 Id. at *2.

14
15 Distinguishing "general economic harms" from the harm
16 in cases where a plaintiff's injury arose from a physical
17 change to the neighborhood's environment, the Kaing court
18 noted, "[A] decline in value that is tied to a purely
19 economic change to a neighborhood is much more difficult
20 to characterize as 'concrete and particularized, and
21 actual or imminent.' Such economic conditions are likely
22 to change with the broader economy, and any decline in
23 housing value can potentially evaporate before Plaintiff
24 has suffered a concrete injury, even in the absence of
25 redress from the courts." Id. at *5, citing Lujan, 504
26 U.S. at 560-61. As the plaintiff had not sold, or even
27 attempted to sell, her house under the changed economic
28

1 conditions, the court concluded, "[I]t is not clear that
2 the diminished value of her house is cognizable as an
3 'injury in fact.'" Id.

4
5 In reaching its conclusion, the Kaing court relied on
6 two other cases arising under similar circumstances --
7 Tingley and Green. In both cases, the plaintiffs filed
8 putative class actions against defendant homebuilders,
9 claiming the defendants targeted low-income purchasers,
10 which resulted in high rates of foreclosure in
11 plaintiffs' neighborhoods and consequently decreased the
12 value of the plaintiffs' residences. See Tingley, 2008
13 WL 1902108, at *1-2; Green, 2007 WL 2688612, at *2.

14
15 Although the Tingley court premised its holding on
16 lack of causation rather than injury in fact, the court
17 noted, "Since the reduced value about which Plaintiffs
18 complain would have resulted from an economic glut of
19 supply, then such harm is only realized if Plaintiffs
20 sell their home during such glut. If Plaintiffs chose to
21 remain in their home until more favorable economic
22 conditions arrive, then they will have realized no loss
23 at all." Tingley, 2008 WL 1902108, at *5, n.3.

24
25 The Green court adopted similar reasoning, holding
26 that although the plaintiff alleged an injury in the form
27 of a generalized loss in the potential market value of
28

1 her house due to excessive foreclosures on other houses
2 in her neighborhood, she did not "suggest that she or any
3 of her other similarly 'injured' neighbors [had] realized
4 this decrease in value (e.g., as a result of sale of the
5 home)." Green, 2007 WL 2688612, at *3. The court thus
6 concluded that the plaintiff's injury was neither
7 concrete nor particularized. Furthermore, it reasoned,
8 "the alleged cause of the decreased value (excessive
9 foreclosures) is of a type which would not necessarily
10 have a long term impact on home prices. This strongly
11 suggests that the injury is conjectural and speculative,
12 and not actual or imminent." Id., citing Lujan, 504 U.S.
13 at 560-61.

14

15 Here, Plaintiffs have not sold their houses at a loss
16 or suffered any actual loss arising from the harms they
17 allege in the FAC. (See FAC ¶¶ 39, 40.) Thus, like the
18 plaintiffs in Kaing, Tingley, and Green, Plaintiffs have
19 not "realized [a] decrease in value." Kaing, 2010 WL
20 625365, at *5; Tingley, 2008 WL 1902108, at *5 n.3;
21 Green, 2007 WL 2688612, at *3. Furthermore, the injury
22 is speculative, rather than actual or imminent, because
23 economic conditions affecting the value of Plaintiffs'
24 houses are subject to change with broader economic
25 conditions. Green, 2007 WL 2688612, at *3; Tingley, 2008
26 WL 1902108, at *4 ("it is just as plausible that a
27 positive change in the unemployment rate, the housing
28

1 market, the mortgage interest rates or other economic
2 factors could cause an increase in [Plaintiffs'] property
3 value[s].") (emphasis added). Thus, the alleged decline
4 in value that Plaintiffs claim to have suffered may
5 vanish before Plaintiffs suffer a concrete injury. See
6 Kaing, 2010 WL 625365, citing Lujan, 504 U.S. at 560-61.

7
8 To bolster their claim and distinguish the facts here
9 from Tingley and Green, Plaintiffs allege they suffered
10 additional injuries: "[U]nstable neighborhoods, multiple
11 families living in one home, transient neighbors with no
12 long-term ties to the neighborhood, unfinished and
13 unkempt yards, and in some cases, increased crime." (See
14 Stephens Opp'n at 13.) This attempt fails, however,
15 because Plaintiffs' FAC contains nothing more than
16 speculation to link these harms to Defendants' conduct or
17 omissions. See Kaing, 2010 WL 625365, at *5-6 (holding
18 that plaintiffs claiming similar injuries failed to
19 allege a cognizable injury in fact). See Section
20 III(A)2, below.

21
22 Plaintiffs also attempt to distinguish this case from
23 Tingley and Green by arguing that the plaintiffs in those
24 cases did not allege a failure to disclose or that the
25 prices of their houses were "artificially inflated" as a
26 result of the defendant homebuilders' conduct. (Stephens
27
28

1 Opp'n at 13.) The existence of an additional allegation
2 of harm, however, does not salvage the FAC.

3
4 Moreover, Plaintiffs fail to distinguish their case
5 from Kaing, in which the plaintiff claimed failure to
6 disclose and also alleged she was overcharged. 2010 WL
7 625365, at *2. Plaintiffs fail to persuade the Court
8 that these factors are sufficient to transform their
9 speculative harms into a cognizable injury in fact.

10
11 Plaintiffs rely on Friends of the Earth, Inc. v.
12 Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000), to
13 argue they have pled a cognizable injury in fact.
14 (Stephens Opp'n at 9-10.) There, the Supreme Court
15 considered the ability to sue for environmental harm, and
16 held that a citizen adequately pled an injury in fact by
17 alleging the defendant's pollution interfered with
18 recreational opportunities. 528 U.S. at 183. Plaintiffs
19 point to language in the opinion referring to an alleged
20 diminution in the value of the litigants' property. Id.
21 at 182-83. A diminution in value that is tied to a
22 physical change in the neighborhood's environment, such
23 as pollution in the case of Friends of the Earth, is
24 better characterized as concrete and particularized, and
25 actual or imminent, than a purely economic change in a
26 neighborhood. Lujan, 504 U.S. at 560-61.

1 When faced with similar facts, the district court in
2 Kaing found the plaintiff had failed to plead actual
3 injury. 2010 WL 625365, at *5 ("Compared to the
4 diminution in value that is tied to a physical change to
5 the neighborhood's environment, such as pollution . . . a
6 decline in value that is tied to a purely economic change
7 to a neighborhood is much more difficult to characterize
8 as concrete and particularized, and actual or
9 imminent."). The Kaing court noted a key difference
10 between environmental harm tied to physical damage and
11 economic harm: "[A diminution in value arising from
12 economic harm] can potentially evaporate before Plaintiff
13 has suffered a concrete injury, even in the absence of
14 redress from the courts." Id. While environmental
15 damage caused by pollution does not redress itself, the
16 complex economic factors that affected the value of
17 Plaintiffs' residences can improve. See Tingley, 2008 WL
18 1902108, at *4 n.3.

19
20 The capacity for Plaintiffs' alleged injury to
21 fluctuate with changes in the economy, "strongly
22 suggests" that Plaintiffs' alleged injury is "conjectural
23 and speculative, not actual or imminent." Green, 2007 WL
24 2688612, at *3; see Sanner v. Bd. of Trade of City of
25 Chicago, 62 F.3d 918, 924 (7th Cir. 1995) (finding
26 soybean farmers who refrained from selling their crops
27 due to a depressed market price lacked standing to sue
28

1 under Article III, while those who sold at the depressed
2 price enjoyed standing because "[t]he fact of a sale at
3 an allegedly depressed price establishes discernable
4 injury in a manner in which a failure to sell cannot."),
5 citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S.
6 723, 743 (1975).

7
8 Plaintiffs next argue they have suffered an injury in
9 fact because California law permits real estate buyers to
10 sue for rescission and damages when a seller fails to
11 disclose material facts. (Stephens Opp'n at 10-11); see
12 Reed v. King, 145 Cal. App. 2d 261 (1983). This argument
13 fails, however, because it merely states the remedies
14 available to plaintiffs in failure to disclose cases, but
15 does not establish an injury.

16
17 Furthermore, the facts in the cases Plaintiffs cite
18 are distinguishable from the context of this case; the
19 failure to disclose in the former cases recognized a duty
20 to disclose (1) physical defects and legal impediments to
21 use of real property, (Karoutas v. HomeFed Bank, 232 Cal.
22 App. 3d 767, 771 (1991) (finding a duty to disclose where
23 plaintiff's residence had substantial and permanent soil
24 movement that required costly repairs); SanFran Co. v.
25 Rees Blow Pipe Mfg. Co., 168 Cal. App. 2d 191, 205
26 (finding a duty to disclose where a property was missing
27 walls and subject to various building code violations);

28

1 Graf v. Sumpter, 207 Cal. App. 2d 391, 392-93 (finding a
2 duty to disclose where the land upon which plaintiffs'
3 residence was built was not properly compacted, causing
4 cracking and crumbling of the residence); or (2) in cases
5 of extreme stigma, (Reed v. King, 145 Cal. App. 3d 261,
6 267 (1983) (finding a duty to disclose where residence
7 was site of gruesome multiple murders committed on the
8 property, but noting that such circumstances were "highly
9 unusual"))).

11 **2. Overpayment Theory**

12 Finally, as to Plaintiffs' overpayment theory, the
13 Court construes these allegations as an attempt to
14 describe Defendants' motives for issuing subprime loans.
15 To the extent, however, that Plaintiffs allege they
16 overpaid as a result of Defendants' efforts to inflate
17 housing demand artificially by offering subprime loans,
18 the Court finds the alleged injury is too speculative to
19 constitute an injury in fact because it is not "concrete
20 or verifiable." See Kaing, 2010 WL 625365, at *3, n.2.
21 Plaintiffs allege that Defendants "market[ed] materials
22 that depicted the community as a stable, family[-]based
23 neighborhood" (FAC ¶¶ 39, 40) and "provided . . . false
24 and misleading standardized representations and
25 advertisements regarding the value of the house sold[,]
26 [t]he sales practice of selling to investors[,] and the
27 desirability of the neighborhood where the house was
28

1 sold" (FAC ¶ 77). Plaintiffs also allege that Defendants
2 offered subprime loans to "artificially inflate[] demand"
3 and thereby increase prices for houses in Plaintiffs'
4 neighborhoods. (FAC ¶¶ 21, 32, 51-52.) As with
5 Plaintiffs' reduced-value theory, the capacity for
6 Plaintiffs' alleged injury to fluctuate with changes in
7 the economy, "strongly suggests" that Plaintiffs' injury
8 is "conjectural and speculative, not actual or imminent."
9 Green, 2007 WL 2688612, at *3.

10
11 Thus, the Court finds that Plaintiffs have failed to
12 articulate an injury in fact that is "concrete and
13 particularized, and actual or imminent." Cf. Lujan, 504
14 U.S. at 560-61.

15
16 **B. Causation**

17 Plaintiffs "face[] a similarly insurmountable problem
18 with respect to the causation element of standing."
19 Kaing, 2010 WL 625365, at *6. Plaintiffs allege they
20 overpaid for their houses and suffered a reduction in the
21 value of their properties caused by Defendants' wrongful
22 acts and omissions. Plaintiffs' injury must be "fairly
23 traceable to the challenged action of the defendant, and
24 not the result of the independent action of some third
25 party not before the court." Lujan, 504 U.S. at 560.
26 "The line of causation between the [alleged] illegal
27
28

1 conduct and injury" must not be "too attenuated." Allen
2 v. Wright, 468 U.S. 737, 752 (1984).

3
4 **1. Reduced-Value Theory**

5 Plaintiffs' reduced-value injury is not "fairly
6 traceable" to the challenged action of Defendants.
7 First, any loss in value Plaintiffs have suffered has
8 resulted not just from the actions of Defendants, but
9 also from the independent actions of others, e.g.
10 homeowners in Plaintiffs' neighborhoods who defaulted on
11 their mortgages and third-party mortgage companies that
12 foreclosed on houses in Plaintiffs' neighborhoods.
13 Plaintiffs' theory is premised upon a chain of causation
14 that is affected by general economic factors. These
15 general factors can have unpredictable effects, such as
16 collapse of financial institutions, changes in the credit
17 market, and rising unemployment, which by themselves or
18 in combination affect the housing market. In other
19 words, any injuries suffered by Plaintiffs necessarily
20 depend upon a causal chain that includes numerous
21 independent forces and individual decisions of "some
22 third part[ies] not before the court." Lujan, 504 U.S.
23 at 560-61.

24
25 Plaintiffs allege that Defendants (1) "marketed the
26 house and neighborhood as stable and desirable" (FAC ¶¶
27 20, 39-40, 45, 89, 96); (2) sold houses to "unqualified
28

1 and high-foreclosure-risk buyers" and assisted them in
2 purchasing or financing their houses (FAC ¶¶ 21, 24); (3)
3 sold houses to "investors that were not owner[-]occupiers
4 of the houses," (FAC ¶¶ 21, 26, 50); and (4) did not
5 disclose this information to Plaintiffs (FAC ¶ 30, 30-40,
6 49, 70). Plaintiffs conclude that as a result of
7 Defendants' conduct, the "neighborhoods where Plaintiffs
8 live have had a number of foreclosures," which "have
9 resulted in substantial loss of value to the surrounding
10 homes." (FAC ¶ 52.)

11
12 As Defendants point out, an examination of the causal
13 chain reveals the speculative nature of Plaintiffs'
14 injuries. (Lennar Mot. at 9.) Plaintiffs allege that
15 Defendants sold houses in Plaintiffs' neighborhoods to
16 "unqualified" buyers. Plaintiffs define as "unqualified"
17 those buyers who purchased their houses with less than a
18 20% down payment. Later, some of these unqualified
19 buyers defaulted on their mortgage loans. Eventually,
20 third-party mortgage companies foreclosed on those
21 houses; Defendants did not initiate these foreclosure
22 proceedings. The loss of houses due to foreclosure --
23 along with other factors -- eventually contributed to a
24 decrease in the value of Plaintiffs' houses. (See
25 Stephens Opp'n at 9.) When examining the chain of events
26 Plaintiffs allege, it is apparent that the Plaintiffs'
27 alleged injuries necessarily depend upon a causal chain

28

1 that includes numerous independent forces and individual
2 decisions of "some third part[ies] not before the court."
3 Lujan, 504 U.S. at 560-61.

4
5 Other courts have reached the same conclusion when
6 faced with nearly identical allegations. See Kaing, 2010
7 WL 625365, at *6; Tingley, 2008 WL 1902108, at *4; Green,
8 2007 WL 2688612, at *3. As the Kaing and Tingley courts
9 noted, a causal chain cannot be found or even inferred
10 from such allegations because each link in the chain may
11 be caused by factors other than Defendants' conduct.
12 Kaing, 2010 WL 625365, at *6; Tingley, 2008 WL 1902108,
13 at *4. For example, the other owners may have defaulted
14 on their mortgages as a result of "other factors, such as
15 unemployment, health problems, a general weakening of the
16 economy, or other financial conditions." Tingley, 2008
17 WL 1902108, at *4. Furthermore, there are "intervening
18 decisions by the mortgage assignees to foreclose the
19 defaulted mortgages rather than to restructure the loans,
20 which may have been done for reasons totally apart from
21 the alleged fraud." Id.

22
23 The allegations that the depreciation of Plaintiffs'
24 property was caused by the foreclosures in their
25 neighborhood, "rather than as a result of a myriad of
26 other factors, such as rising unemployment in the region,
27 changes in the housing market, or other economic

28

1 conditions," falls short of the standard required to
2 plead causation. Kaing, 2010 WL 625365, at *6. Although
3 foreclosures can have an adverse impact on property
4 values, supply and demand are affected simultaneously by
5 a number of market factors. See Tingley, 2008 WL
6 1902108, at *4. Any combination of these factors may
7 have caused a reduction in Plaintiffs' property values.
8 See id. Even assuming that the value of Plaintiffs'
9 property was affected adversely by foreclosures in their
10 neighborhoods, the connection "remains too tenuous to
11 provide standing." Id.

12
13 The additional injuries Plaintiffs allege in the FAC
14 -- "unstable neighborhoods, multiple families living in
15 one home, transient neighbors with no long-term ties to
16 the neighborhood, unfinished and unkempt yards, and in
17 some cases, increased crime" -- are not "fairly
18 traceable" to the challenged action of Defendants.
19 Viewing the allegations in FAC in the light most
20 favorable to Plaintiffs, Plaintiffs fail to plead facts
21 sufficient "to raise a right to relief above the
22 speculative level." Bell Atlantic, 550 U.S. at 555. The
23 FAC contains nothing more than speculation to link these
24 harms to Defendants' conduct or omissions. See Kaing,
25 2010 WL 625365, at *5-6 (holding that plaintiffs claiming
26 similar injuries failed to allege causation sufficient to
27 survive a motion to dismiss).

28

1 The fragility of the connection between Defendants'
2 alleged conduct and the decreased value of Plaintiffs'
3 houses is illuminated "with each additional link in the
4 chain where the choices of others have an impact and make
5 other scenarios at least as plausible as the one advanced
6 by . . . Plaintiffs." Id. Put into concrete terms,
7 because Plaintiffs still own their properties, a positive
8 change in the unemployment rate, housing market, mortgage
9 interest rates, or other economic factors could cause
10 Plaintiffs' property values to increase, thus decreasing
11 or obviating their alleged losses. Again, other courts
12 reached the same conclusion. Tingley, 2008 WL 1902108,
13 at *4; Green, 2007 WL 2688612, at *3.

14

15 2. Overpayment Theory

16 Turning to Plaintiffs' overpayment theory, the Court
17 construes these allegations as an attempt to describe
18 Defendants' motives for issuing subprime loans. To the
19 extent, however, that Plaintiffs allege they overpaid for
20 their houses as a result of Defendants' efforts to
21 inflate housing demand artificially by offering subprime
22 loans, the causal connection between the alleged
23 overpayment and Defendants' "scheme" depends upon
24 numerous independent factors and third parties not before
25 the court. See Kaing, 2010 WL 625365, at *6.

26
27
28

1 The third parties include, for example, the alleged
2 "unqualified" and "investment" buyers to whom Plaintiff
3 also indirectly assign blame for the decrease in their
4 property values. These third parties acted
5 independently, e.g., to default on loan payments, to
6 choose their tenants, or to maintain their properties,
7 which in turn directly affect losses Plaintiffs allegedly
8 suffered, thus making it impossible to trace those losses
9 to Defendants' alleged misconduct.

10
11 Similarly, the "housing bubble," or inflation of
12 housing prices, was a nationwide phenomenon, traceable to
13 variables independent of Defendants' alleged scheme, such
14 as lax regulatory enforcement, rates of unemployment,
15 credit market developments, and general economic growth.
16 As with Plaintiffs' reduced-value theory, it cannot be
17 said that the inflated purchase prices Plaintiffs
18 allegedly paid are fairly traceable to Defendants'
19 alleged "scheme."

20
21 Thus, taking Plaintiffs' allegations as true, as the
22 Court must for these purposes, Plaintiffs' harm is not
23 "fairly traceable" to Defendants' alleged conduct.
24 Plaintiffs, therefore, do not have standing to sue for
25 paying an "inflated" purchase price for their houses or
26 for a subsequent reduction in value of their houses.
27 Hence, the Court lacks subject matter jurisdiction over
28

1 this action and accordingly DISMISSES the FAC,³ with
2 prejudice.

3

4

IV. CONCLUSION

5 For the foregoing reasons, the Court GRANTS
6 Defendants' Motion to Dismiss. As the Court finds that
7 Plaintiffs would be unable to amend their pleadings to
8 correct the deficiencies related to constitutional
9 standing, it dismisses the First Amended Complaint with
10 prejudice.

11

12 The Court DENIES Defendants' Motion to Strike as
13 moot.

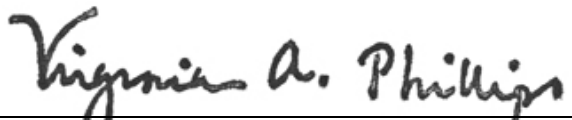
14

15 **IT IS SO ORDERED.**

16

17

18 Dated: March 31, 2010



VIRGINIA A. PHILLIPS
United States District Judge

19

20

21

22

23

24

25

26 ³ As the Court finds Plaintiffs lack standing to
27 assert their claims, it does not have jurisdiction over
28 this matter. The Court, accordingly, does not reach
Plaintiffs' and Defendants' arguments regarding Rule 9
and 12(b)(6) as to each claim.